No. 15593

United States Court of Appeals
For the Ninth Circuit

CARPENTERS UNION, LOCAL 131; CARPENTERS UNION, LOCAL 1289; SEATTLE DISTRICT COUNCIL OF CARPENTERS, affiliated with THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; TEAMSTERS, CHAUFFEURS AND HELPERS, LOCAL UNION NO. 174, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 302, AFL-CIO; and LOCAL 404, INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS' UNION OF AMERICA, AFL-CIO, *Appellants,*

vs.

CISCO CONSTRUCTION CO., an Oregon corporation, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF OF APPELLANTS

On behalf of the Appellants Carpenters Union, Local 131; Carpenters Union, Local 1289; Seattle District Council of Carpenters, affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO; Teamsters, Chauffeurs and Helpers, Local Union 174 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO:

SAMUEL B. BASSETT
BASSETT, DAVIES & ROBERTS, Attorneys at Law
811 New World Life Bldg., Seattle 4, Washington

On behalf of the Appellant Union of Operating Engineers, Local 302, AFL-CIO:

L. PRESLEY GILL, Attorney at Law
2800 First Avenue, Seattle 1, Washington

On behalf of the Appellant International Hod Carriers, Building and Common Laborers' Union of America, Local 440, AFL-CIO:

ROY E. JACKSON, Attorney at Law
1207 American Building, Seattle 4, Washington

THE ARGUS PRESS, SEATTLE

No. 15593

United States Court of Appeals

For the Ninth Circuit

CARPENTERS UNION, LOCAL 131; CARPENTERS UNION, LOCAL 1289; SEATTLE DISTRICT COUNCIL OF CARPENTERS, affiliated with THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; TEAMSTERS, CHAUFFEURS AND HELPERS, LOCAL UNION NO. 174, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 302, AFL-CIO; and LOCAL 404, INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS' UNION OF AMERICA, AFL-CIO, *Appellants,*

vs.

CISCO CONSTRUCTION CO., an Oregon corporation, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF OF APPELLANTS

On behalf of the Appellants Carpenters Union, Local 131; Carpenters Union, Local 1289; Seattle District Council of Carpenters, affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO; Teamsters, Chauffeurs and Helpers, Local Union 174 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO:

SAMUEL B. BASSETT
BASSETT, DAVIES & ROBERTS, Attorneys at Law
811 New World Life Bldg., Seattle 4, Washington

On behalf of the Appellant Union of Operating Engineers, Local 302, AFL-CIO:

L. PRESLEY GILL, Attorney at Law
2800 First Avenue, Seattle 1, Washington

On behalf of the Appellant International Hod Carriers, Building and Common Laborers' Union of America, Local 440, AFL-CIO:

ROY E. JACKSON, Attorney at Law
1207 American Building, Seattle 4, Washington

THE ARGUS PRESS, SEATTLE

INDEX

TABLE OF CASES

No. 15593

United States Court of Appeals
For the Ninth Circuit

CARPENTERS UNION, LOCAL 131; CARPENTERS UNION, LOCAL 1289; SEATTLE DISTRICT COUNCIL OF CARPENTERS, affiliated with THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; TEAMSTERS, CHAUFFEURS AND HELPERS, LOCAL UNION NO. 174, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 302, AFL-CIO; and LOCAL 404, INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS' UNION OF AMERICA, AFL-CIO, *Appellants,*

vs.

CISCO CONSTRUCTION CO., an Oregon corporation, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF OF APPELLANTS

I. REPLY TO APPELLEE'S STATEMENT OF THE CASE

Appellee, in its answering brief, does not question the extensive and accurate statement of the case contained in appellants' opening brief. Nonetheless, appellee has undertaken to present its own version of the case, repeating, for the most part, material previously contained in appellants' statement.

There are several inaccuracies and irrelevancies contained in appellee's statement of the case, as follows:

A. The Job Site Picket Lines Were Established on October 28, 1954

On page 5 of its brief, lines 13-14, appellee states that the construction site picket lines were established on November 5, 1954. This is not correct. It is undisputed that the job site picket lines were created on or about October 28, 1954 (R. 13, 450). Indeed, the trial court so found (Finding of Fact No. V).

Appellee's misconception as to the day that the picketing began underscores the weakness of appellee's position on the question of liability. See pp. 5 to 7, *infra.*

B. There Was No Mass Picketing and No Violence or Misconduct on the Job Site Picket Lines

On page 5, lines 2-11, appellee states that the job site picketing prevented ingress and egress to the job sites and that opprobrious language was used by the pickets. For what it is worth, there was evidence that *on one occasion,* a picket's car blocked the roadway to the Redmond job site for a very brief time. This same picket used "foul language" when asked by appellee's president to move his car (R. 99-100).

Except for this single incident, the picketing was properly conducted, in a peaceful and orderly manner. Appellee's assistant superintendent testified that he reached an agreement with a representative of the appellant Carpenters to the effect that both sides would watch for and prevent misconduct. This arrangement worked out very well and the appellee "had no difficulty" with the pickets (R. 493-494).

In any event, appellee did not claim during the trial below, nor did the trial court find, that any improper conduct on the part of job site pickets either created liability for the appellants, or caused measurable damage to the appellee.[1]

Similarly, on page 12, lines 14-16, appellee recites that its equipment was subject to sabotage and vandalism, inferring that this was the responsibility of the appellants. Such evidence was entirely outside the issues litigated in the court below and, for this reason, when appellee introduced such evidence, it was stricken by the trial court (R. 286).

C. The Absence of Employee Forcier Was Unrelated to Any Activity of Appellants

On page 6, lines 5-6, appellee states that one Forcier, an employee of Cadman Sand & Gravel Co., left his job as a result of threats by an agent of appellant Teamsters, and did not return for two weeks. Forcier's absence from work had nothing to do with the activities of appellant unions. As he himself explained, he sustained an injury to his hand, requiring the temporary layoff (R. 161).

D. The Subcontractors Did Not Totally Fail to Perform

On page 12, lines 24-28, appellee states that all of

---

[1] See also National Labor Relations Board v. International Rice Milling Co., 341 U.S. 665 (1951), at page 672. As the court held, the use of violence on the picket line is immaterial in the determination of whether a secondary boycott has been committed. It is the "object" of the union's conduct which is proscribed, not the "means" employed to accomplish the object.

lants' unlawful conduct. Leaving aside for the moment the question of the legality of appellants' conduct, it appears that appellee is guilty of a gross overstatement. *There is no substantial evidence in the record that appellee's subcontracts were, in fact, terminated.* The evidence proves the contrary.

Most of the subcontractors were engaged to furnish materials and to deliver or install them at the job sites (see appellants' opening brief, pp. 4-6). When the job site picket lines were created, the subcontractors failed to deliver or install the materials, as they had contracted to do. However, through special arrangement with the appellee, they continued to furnish appellee with materials (R. 199, 240, 261, 262-263, 304, 308). In this fashion, most of the subcontractors performed, at least partially, their subcontracts. Appellee simply adjusted the subcontract price, to make up for the added expense in delivering and installing the materials (R. 133, 136, 206, 265). There is no evidence that appellee lost completely the value of the subcontractors or that they were "terminated" as appellee claims.

II. REPLY TO APPELLEE'S ARGUMENT IN SUPPORT OF THE JUDGMENT BELOW

On the whole, appellants do not find it necessary or appropriate to reply to the arguments contained in appellee's brief. Most of those arguments are adequately answered by the authorities and reasoning set forth in the opening brief.

Some comment is required, however, on the argu- its subcontracts were terminated as a result of appel-

ments advanced by appellee in support of the trial court's judgment (see appellee's brief, pp. 15-23).[2]

A. Appellee's Argument in Support of the Judgment Below Has No Basis in the Facts of This Case

Appellee contends that the job site picket lines were created on November 5, 1954. As we have previously noted, this is incorrect. The job site picketing began several days earlier, on October 28, 1954. This misconception as to when the picketing began points up a fatal defect in appellee's argument in support of the judgment below, as we shall hereafter demonstrate.

In order to justify the instant judgment, appellee must argue that the job site picketing is unlawful. The failure of performance on the part of the subcontractors resulted from the job site picket lines and if there is to be a recovery, it must be on the theory that such picket lines constituted a secondary boycott. Accordingly, on page 23 of its brief, appellee submits the following proposition:

> "*The defendants were at fault in maintaining a picket line continuously from November 5th* until the job construction was completed *in the vicinity of both plaintiff's job sites* and in the vicinity of at least one of plaintiff's subcontractor's places of business, in making statements that they were out to destroy plaintiff's business and also in inducing and encouraging employees of other

[2] At the top of page 15 is the heading "Argument in Support of Trial Court's Oral Opinion." This is obviously an error. It is the trial court's findings and judgment which are questioned on this appeal, and not the content of an oral opinion rendered during the trial.

employers to refuse to do work or to perform services for the plaintiff." (Emphasis added)[3]

The flaw in appellee's argument is revealed by a restatement of the basic facts of this case, in chronological order:

The job site picketing began, not on November 5, 1954, as appellee claims, but several days earlier, on October 28. The picketing had an *immediate effect* upon the subcontractors. Those subcontractors who were already on the job pulled off, and those who had yet to perform refused to do so. In some cases, the failure of the subcontractors to perform further was a decision voluntarily made by the subcontractor itself, and in other instances, it was dictated by the refusal of the employees to cross the picket lines (see appellants' opening brief, pp. 9-11).

The failure of performance on the part of the subcontractors occurred at a time when none of the appellants, other than the appellant Carpenters, were on the scene.

When it became apparent that the subcontractors were not going to deliver and install the materials, as they had promised to do, the appellee made arrangements with these subcontractors so that they would continue to furnish materials, which would be picked up in appellee's trucks. These arrangements were made

[3] Appellee made a similar argument in the court below. At the end of the trial, the trial court ruled that the job site picket lines were legal. Subsequently, appellee submitted a memorandum, urging the trial court to go further and hold that the picketing was unlawful. In appellee's view, the job site picket lines were so commingled with other "illegal acts" as to make "the perpetrator liable for all damages ensuing" (R. 33-34). The trial court adhered to its earlier ruling that the picketing was legal (Conclusion of Law No. III).

with Cadman Sand & Gravel (R. 199), Layrite Concrete Products (R. 240), and Western Sand & Gravel (R. 304, 308), among others.

Subsequently, as appellee began to pick up materials from the premises of the subcontractors, the various appellants, in an apparent effort to persuade the employees of the subcontractors not to load the materials on appellee's trucks, engaged in certain conduct which could be found to constitute a secondary boycott within the meaning of Section 303 of the Act. Even if we assume that this conduct violated the Act, it is clear that no damage resulted to appellee. The employees of the subcontractors totally ignored the appeals made to them by union representatives and continued to load appellee's trucks (see complete discussion in opening brief, pp. 67-75).[4]

Appellee's argument that the primary job site picketing was made unlawful by being "commingled" with the unlawful activities of the appellants on the premises of the subcontractors has no factual foundation. The job site picket lines were created and maintained by appellant Carpenters, and observed by the subcontractors and their employees, at a date ante to the involvement of the remaining appellants and the resulting "secondary" activities.

B. Appellee's Argument Not Supported by the Trial Court's Findings of Fact and Conclusions of Law

That appellee's argument is lacking in merit is illus-

[4] It is noteworthy that appellee, in its entire brief, does not contest the fact that there was no work stoppage by the employees of the subcontractors.

trated by the fact that the trial court made no finding of fact or conclusion of law to the effect that the job site picket lines were illegal, or that appellee was entitled to damages flowing therefrom. To the contrary, the trial court concluded that the job site picket lines were not unlawful (Conclusion of Law No. III).

C. Appellee's Argument Not Supported by the Findings of the National Labor Relations Board

A further illustration of the weakness of appellee's position is provided by the findings made by the National Labor Relations Board, upon which the appellee so heavily relies (see appellee's brief, pp. 20-22). While the Board found that the activities of the appellants on the premises of the subcontractors constituted a violation of the Act, the Board *did not find* that the job site picket lines were unlawful.[5]

D. Cases Cited by Appellee Are Distinguishable

On pages 17-20 of its brief the appellee cites five cases in support of its proposition that the job site picket lines were unlawful. These cases are inapposite.

In four of the cited cases, a union had a dispute with one of the contractors working on a construction site shared by other contractors. In order to resolve the dispute the union undertook to picket the construction site. The courts held, in each case, that the picketing was an unlawful secondary boycott on the theory that the union deliberately tried to involve the employees of the neutral contractors. The basic evidence against the union was the fact that the union used a picket sign

[5] This is the reason why Mr. Bassett, counsel for several of the appellants, commented to the trial court about the Board's findings.

which suggested to the employees that the entire construction job was unfair. The sign did not specify the contractor with whom the union had its dispute.

In *Getreu v. Brotherhood of Painters, Decorators and Paperhangers, Local Union 913* (D.C. N.D. Ga. 1953) —F.Supp. —, 24 L.C. 67,906, the court held:

> "The sign used . . . could easily be taken to mean that the general contractor was the person allegedly unfair in connection with the glass work on this job. All the facts and circumstances . . . in connection with this picketing indicate it was not clearly disclosed to workers on the job . . . that the dispute was only with Pittsburgh, the primary employer."

In *Piezonski v. NLRB* (4th Cir. 1955) 219 F.2d 879, the court held:

> ". . . the picketing did not disclose clearly that the dispute was with the primary employer, the general contractor."

Similarly, in *National Labor Relations Board v. Denver Building and Construction Trades Council,* 341 U.S. 675 (1951) and in *International Brotherhood of Electrical Workers, Local 501 v. National Labor Relations Board,* 341 U.S. 694 (1951), the unions used a sign stating that "This Job" is unfair. The contractor with whom the union had its dispute was not named.

Nothing approaching the fact situations in these cases is involved in the instant matter. Here, the appellant Carpenters used picket signs which clearly indicated that the dispute was with the appellee, "Cisco Construction Company." Under the prevailing view, appellants' picketing was lawfully conducted (see complete discussion in opening brief, pp. 63-67).

E. Conclusion

Appellees' argument that the job site picketing was so commingled with the unlawful secondary activities on the premises of the subcontractors, as to make it unlawful, must be rejected. Such an argument has no support in the facts of this case or in the law of secondary boycott. Even the National Labor Relations Board, whose findings appellee fervently espouses, adopted no such theory of the case.

As we have set forth in our opening brief, the job site picket lines were lawfully conducted. The fact that this picketing resulted in a failure of the subcontractors to fully perform their contract is *damnum absque injuria.*

Respectfully submitted,

On behalf of the Appellants Carpenters Union, Local 131; Carpenters Union, Local 1289; Seattle District Council of Carpenters, affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO; Teamsters, Chauffeurs and Helpers, Local Union 174 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO:

SAMUEL B. BASSETT
BASSETT, DAVIES & ROBERTS, Attorneys at Law
811 New World Life Bldg., Seattle 4, Washington

On behalf of the Appellant Union of Operating Engineers, Local 302, AFL-CIO:

L. PRESLEY GILL, Attorney at Law
2800 First Avenue, Seattle 1, Washington

On behalf of the Appellant International Hod Carriers, Building and Common Laborers' Union of America, Local 440, AFL-CIO:

ROY E. JACKSON, Attorney at Law
1207 American Building, Seattle 4, Washington